(4)

No. 91-1946

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF HUMAN SERVICES,

Petitioner,

v.

TRUST COMPANY OF OKLAHOMA,
guardian of the estate of Ellen Lee Barker,
a minor child,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE STATES OF MISSOURI, MONTANA, AND NEBRASKA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

GREG G. GOULD
Special Assistant
Attorney General
Department of Social
and Rehabilitation
Services
111 Sanders Street
P.O. Box 4210
Helena, Montana
59604-4210

CHARLES A. MILLER
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania
Avenue, N.W.
P.O. Box 7566
Washington, D.C.
20044
(202) 662-6000

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Amici hereby respectfully move for leave to file the attached brief amicus curiae in support of petitioner in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amici in this case, as described in detail in the attached brief, arises from the fact that, like petitioner, amici are states that seek to save millions of Medicaid dollars per year by counting as assets (for Medicaid eligibility purposes) personal injury lawsuit settlement trusts. The Oklahoma Supreme Court decision below interpreted the Medicaid Act to forbid a state from counting such trusts as assets. The Oklahoma court's rule effectively allows tortfeasors, by configuring their settlements as trusts, to pass on much of the cost of the injuries they cause to state and federal taxpayers. Amici are all states for which the

law is, at worst, the same as in Oklahoma or, at best, unsettled.

Petitioner argues that the Medicaid Act allows the state to count various other kinds of trusts in addition to personal injury settlement trusts. Amici support petitioner in this broader argument but focus on the particularly erroneous nature -- in terms of both law and policy -- of the Oklahoma court's decision in the personal injury settlement trust context. Amici feel that the Court will be aided by the presentation of a narrower perspective on the issues in this case.

Respectfully submitted,

GREG G. GOULD
Special Assistant
Attorney General
Department of Social
and Rehabilitative
Services
111 Sanders Street
P.O. Box 4210
Helena, Montana
59604-4210

CHARLES A. MILLER
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania
Avenue, N.W.
P.O. Box 7566
Washington, D.C.
20044
(202) 662-6000

Attorneys for Amici

July 1, 1992

BRIEF OF THE STATES OF
MISSOURI, MONTANA, AND NEBRASKA,
AS AMICI CURIAE IN SUPPORT OF PETITIONER

QUESTION PRESENTED

1. Whether the Medicaid Act permits states, in making eligibility determinations, to count as an "available resource" any trust that is established as part of a negotiated personal injury lawsuit settlement but that contains a provision that the trust is not to be used to pay the medical costs of the injury (unless public assistance is terminated).

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INTEREST OF THE AMICI CURIAE

Amici are states that participate in federal matching fund programs authorized by the Social Security Act, including Medicaid (Title XIX). Serious personal injury accidents caused by negligent tortfeasors and involving victims of modest means, such as the accident in this case, occur frequently in these states. States have various ways of ensuring that such tortfeasors, rather than Medicaid, ultimately pay the medical expenses of the injuries they cause. The Medicaid Act, in fact, requires states to make all reasonable efforts to pursue payment from responsible tortfeasors.[1/]

[1/] See 42 U.S.C. § 1396a(25) (Supp. 1990) (requiring states to "take all reasonable measures to ascertain the legal liability of third parties" and to "seek reimbursement . . . to the extent of such liability"). See generally Deborah Tussey, Annotation, Personal Injury Recovery as Effecting Eligibility For, or Duty to Reimburse, Public Welfare Assistance, 80 A.L.R. 3d 772 (1977 & Supp. 1991).

Specifically, states typically pay the victim's high medical costs as they are incurred and then seek reimbursement if there is a responsible tortfeasor. Reimbursement is pursued either directly, by suing the tortfeasor on behalf of the victim, or indirectly, by recovering the medical costs from any money judgment or settlement that the victim has secured. If and when the victim recovers, all future medical expenses are paid from the judgment or settlement funds, not from Medicaid funds (at least until the amount of the judgment or settlement apportioned for medical expenses is dissipated). To require otherwise -- that is, to require Medicaid to pay in addition to the tortfeasor -- is to allow the victim double recovery.

The policy of making liable tortfeasors, rather than Medicaid, ultimately pay for the injuries they cause avoids unnecessary expenditures of taxpayer money.

The Health Care Financing Administration ("HCFA"), the agency that administers the Medicaid Act, estimates that the presence of liable third parties -- including tortfeasors -- saves the Medicaid system over a billion dollars of state and federal funds per year.[2/]

The regrettable consequence of the Oklahoma Supreme Court's interpretation of the Medicaid Act in this case is to limit drastically the Medicaid system's ability to take financial advantage of the presence of responsible tortfeasors. Specifically, the decision effectively prohibits Oklahoma from collecting medical cost reimbursements (or from denying additional claims after recovery) in any situation in which the tortfeasor and the victim negotiate a settlement in the form of a trust and include in the trust a

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[2/] **Senate Comm. on Energy and Commerce, 100th Cong., 2d Sess., Medicaid Source Book: Background Data and Analysis** 146 (Comm. Print 1988).

provision that the funds not be used for any medical expenses unless public assistance is terminated -- what may be called a "qualified no-medical-expenses provision." Because under the Oklahoma's decision it is always to both parties' advantage to negotiate such a trust,[3/] valuable Medicaid resources will be increasingly diverted as more and more tort settlements are configured this way. At a time of severe pressure on state and federal budgets and of growing demand for government-financed health care for the truly indigent, the financial implications of the Oklahoma Supreme Court decision are particularly acute.

Though this brief focuses on personal injury settlement trusts, the interest of amici extends -- as does

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[3/]This is because the tortfeasor saves having to pay any of the victim's medical expenses and can pass on some of the savings to the victim as an inducement for her to agree to a settlement trust with a qualified no-medical-expenses provision. The victim's medical expenses are paid either way.

petitioner's interest -- to all trusts that include qualified no-medical-expenses provisions, such as various kinds of testamentary trusts. Viewed from this more general perspective, the financial consequences of the Oklahoma Supreme Court's are even more severe. The decision effectively forces states to provide valuable Medicaid funds to large numbers of relatively well-off people who, were their assets not in the form of a trust, would be ineligible.

This case presents the Supreme Court its first opportunity to decide whether the Medicaid statute forbids states, in determining Medicaid eligibility, from counting as assets trusts with qualified no-medical-expenses provisions. The state courts are divided, including over the particular issue of personal injury settlement trusts. Given what is at stake in having the relevant Medicaid provisions properly and uniformly

interpreted, amici strongly urge the Court to accept Oklahoma's petition for a writ of certiorari.

SUMMARY OF FACTS

As recounted at length in the Oklahoma Supreme Court decision and in petitioner's brief, a schoolbus struck Ellen Lee Barker causing her permanent paralysis from the neck down. Because at the time her family had few resources, the Oklahoma Department of Human Services ("DHS") paid the approximately $160,000 in medical expenses that Ellen quickly incurred after the accident. Ellen's mother sued the school district that operated the bus for compensatory damages including all past and future medical expenses arising from the injury (as well as future lost wages and "pain and suffering" damages).

After negotiations, the school district and Ellen's mother eventually settled the claim for $1.35 million. DHS was reimbursed from this sum for its past medical

expenditures on Ellen's behalf.[4/] As required by Oklahoma law in cases involving minors, the school district put the remaining funds in a trust naming Ellen Lee Barker as beneficiary rather than make a direct cash payment.

In pertinent part, the trust agreement stated that "Ellen's medical needs have been provided for by the Oklahoma Department of Human Services."[5/] In addition, the language assumed that DHS would continue to pay such medical needs. On this assumption, the trust went on to say that its funds should generally not be used for ongoing

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[4/]Respondents have argued that by accepting reimbursement for past medical expenses, DHS was estopped from denying eligibility for ongoing and future medical expenses, partly because a DHS employee made some unauthorized representations to that effect during settlement. Because it held that the Medicaid Act does not allow states to count settlement trusts as assets, the Oklahoma Supreme Court did not need to reach the estoppel issue.

[5/]Trust Company of Oklahoma v. State of Oklahoma, ex rel. Dep't of Human Services, 825 P.2d 1295, 1296 n.2 (Okla. 1991) (reprinting excerpts of the trust agreement).

medical expenses but rather for expenses related to lost wages and "pain and suffering" -- i.e., those things that will "assure her of as natural and pleasant a life as is possible in her condition."[6/] Medical expenses would be paid only in the event that public assistance was terminated.

Because the value of the trust far exceeded Oklahoma's limit on the assets that Medicaid recipients may have, DHS eventually terminated its payments for Ellen's ongoing medical expenses. Litigation ensued over the termination. Ultimately the Oklahoma Supreme Court decided that the state could not count the negotiated trust as an asset in determining Ellen's eligibility.

[6/] Id. at 1296 - 97 n.2.

SUMMARY OF ARGUMENT

This case presents an important issue of federal law, one with enormous financial implications for the states and federal government and over which the state courts are split. The particular issue is whether the Medicaid Act permits states, in making eligibility determinations, to count as an asset a trust whose creators did not want it to be used for medical services. The Oklahoma Supreme Court ruled that the Medicaid Act requires states to honor the intent of the trust's creators.

This brief focuses on the particularly erroneous nature of the Oklahoma court's ruling as applied to personal injury settlement trusts -- a unique but important kind of trust. In short, the Oklahoma Supreme Court's interpretation of the relevant Medicaid provisions as applied to these trusts

fails to comport both with the plain meaning of the provisions and the legislative intent behind them. It is also inconsistent with an advisory letter that the Health Care Financing Administration, the agency in charge of administering Medicaid, recently sent to Oklahoma stating that personal injury settlement trusts do count as assets.

Equally important are the extreme financial consequences of the Oklahoma's decision -- a decision which effectively forces states to allow tortfeasors to pass on to the Medicaid system the medical expenses component of their obligation to pay compensatory damages. Such a rule diverts state and federal Medicaid funds away from indigent people who do not have legal entitlement to any other medical funding source. It also allows tortfeasors to pay much less in a settlement than state tort law would otherwise require, simply by configuring

the settlement as a trust. Finally, the rule adopted by the Oklahoma Supreme Court is wholly inconsistent with Congress's mandate to take financial advantage of responsible tortfeasors. A state that is forced to pay medical expenses that tortfeasors ought to be paying can not be said to be fulfilling this mandate.

ARGUMENT

I. THE COURT SHOULD REVIEW THE OKLAHOMA SUPREME COURT'S INTERPRETATION OF THE MEDICAID ACT THAT PROHIBITS A STATE, IN MAKING ELIGIBILITY DETERMINATIONS, FROM COUNTING PERSONAL INJURY LAWSUIT SETTLEMENT TRUSTS AS "AVAILABLE RESOURCES"

A. The Court Should Correct the Oklahoma Supreme Court's Misinterpretation of § 1396a(k) as Applied to Negotiated Personal Injury Settlement Trusts

In 1965, Congress passed the Medicaid Act, a federal matching-fund program designed to provide health care to the truly needy.[7/] States are required to establish reasonable maximum income and resource (i.e.,

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[7/] See 42 U.S.C. § 1396 (Supp. 1990) (stating that Medicaid is designed for "families with dependent children and [] aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services"); see also Atkins v. Rivera, 477 U.S. 154, 156 (1986); Schweiker v. Gray Panthers, 453 U.S. 34, 36 (1981); Harris v. McRae, 448 U.S. 297, 301 (1980) (stating that Medicaid is designed to help states pay the medical expenses of "needy persons").

asset) limits to ensure that only the truly needy receive Medicaid funds.[8/]

Individuals who otherwise would have been ineligible for Medicaid eventually began evading the resource limits by putting their assets into trusts that contained provisions that they were not to be used for medical purposes unless public assistance was terminated. Such trusts, these individuals presumably would have argued, were not "available" to the beneficiary under the general Medicaid provision, 42 U.S.C. §

[8/] See 42 U.S.C. § 1396a(17) (Supp. 1990).

1396a(17)(B),[9/] and thus could not have been counted towards eligibility.

In 1986, Congress responded by passing an amendment to the Act, the "Medicaid Qualifying Trust" provision, 42 U.S.C. § 1396a(k), generally designed to prevent otherwise ineligible individuals from evading resource limits through the use of trusts with qualified no-medical expenses provisions. Specifically, the provision requires states to "deem[] available . . . for purposes of subsection (a)(17)" any inter vivos,

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[9/] 42 U.S.C. § 1396a (Supp. 1990) provides in pertinent part,

> A State plan for medical assistance must . . . (17) . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . .

discretionary trust in which the same "individual" who "establishe[s]" the trust is also the named beneficiary -- a Medicaid Qualifying Trust ("MQT") -- regardless of whether the trust contains a qualified no-medical-expenses provision.[10/] Spouses are considered interchangeable for the purposes of a MQT. Significantly, in explaining the provision, the House Committee Report invoked the Medicaid Act's original purpose:

> The committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves.[11/]

[10/] 42 U.S.C. § 1396a(k) (Supp. 1990).

[11/] H.R. Rep. No. 265, 99th Cong., 1st Sess. 72 (1986). The Report continues, "When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee." It is worth noting that the text of the statute does not use the term

(continued...)

While there is a strong argument that § 1396a(k) -- or at least the more general provision, § 1396(17)(B) -- should be read to deem "available" any trust with a qualified no-medical-expenses provision, even if not literally established by the beneficiary (or her spouse or guardian[12/]), it is indisputable that § 1396a(k)'s definition of a MQT covers personal injury settlement trusts that victims negotiate for themselves.[13/] The Oklahoma Supreme Court's finding (in a footnote) that such trusts are

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[11/](...continued)
"affluent." Any individual who would be ineligible for Medicaid but for having set up an asset-shielding trust is covered.

[12/]See State Medicaid Manual, HCFA-Pub 45-3, Transmittal No. 37 (May 1989) (stating that for the purposes of § 1396a(k), an individual and her legal guardian should be treated as the same person); see also Hatcher v. Dep't of Health and Rehabilitative Services, 545 So.2d 400 (Fla. Dist. Ct. App. 1989).

[13/]See infra note 26 and accompanying text (discussing cases involving trusts other than personal injury settlement trusts).

not MQTs assumed that tortfeasors are the sole creators of settlement trusts and thus that victims can not be said to "establish[]" such trusts on their own behalf. The court summarily asserted that "[h]ere, the settlor [i.e., the creator of the trust] is not the beneficiary . . . but the tortfeasor."[14/]

The Oklahoma Supreme Court's position overlooks the crucial fact that personal injury settlement trusts are not unilaterally-created instruments like the typical donative trust. They are the product of contractually negotiated agreements that require two parties' assent. It takes two parties to establish any given settlement trust, and thus both parties should be deemed its creators. To be sure, the tortfeasor is often the offeror in settlement negotiations and the victim the offeree. Nevertheless,

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[14/] Trust Company of Oklahoma v. State of Oklahoma, ex rel. Dep't of Human Services, 825 P.2d 1295, 1302 n.31 (Okla. 1991).

under the most basic principles of contract law, once a valid settlement contract is formed, such distinctions become irrelevant.

This contract law argument is not meant to be formalistic. When an accident victim (or her guardian) negotiates and assents to, as Ellen's mother did here, a settlement trust that includes a qualified no-medical-expenses provision, all the while recognizing that if the money were paid directly the victim would be ineligible for Medicaid, the victim is taking an action on behalf of herself to evade Medicaid eligibility requirements. Preventing such evasion goes to the core of the purpose behind § 1396a(k), even under its narrowest construction.

Subsequent to the decision below, the Health Care Financing Administration ("HCFA"), the agency within the Department of Health and Human Services charged with

administering the Medicaid statute, recently advised Oklahoma that personal injury settlement trusts are indeed MQTs.[15/] Specifically, HCFA explained that "the State should consider such trusts as Medicaid Qualifying Trusts and count the funds as fully available."[16/] HCFA's position is consistent with its earlier opinions that the MQT provision should not be construed too literalistically.[17/] Because Congress

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[15/]Letter from Don Hearn, Chief of Program Operations Branch for Medicaid, HCFA to Charles Brodt, Assistant Director for Medical Services, Oklahoma Department of Human Services (March 12, 1992) (lodged as Appendix I). HCFA has not as yet issued any regulations directly on the question of whether trusts should count as "available resources" under Medicaid.

[16/]Id.

[17/]See State Medicaid Manual, HCFA-Pub 45-3, Transmittal No. 37 (May 1989) (stating that for the purposes of § 1396a(k), an individual and her legal guardian should be treated as same person); see also Hatcher v. Dep't of Health and Rehabilitative Services, 545 So.2d 400 (Fla. Dist. Ct. App. 1989). In the absence of guidance from HCFA, some courts

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specifically charged HCFA with the responsibility of administering Medicaid, HCFA's interpretation should be accorded

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[17/](...continued)
including the Oklahoma Supreme Court looked to analogous public assistance statutes. For example, the Oklahoma court relied in part on the Supplemental Social Security program ("SSI") regulations that deem "available" any resource that an individual "owns and could convert to cash." See 20 C.F.R. § 416.1201(a); see also 45 C.F.R. § 233.20(a)(3) (stating that for, purposes of the Aid to Families with Dependent Children program, assets are available when "actually available and when the applicant or recipient has a legal interest in the liquidated sum and has the legal ability to make such sum available for support and maintenance"). While the language of this regulation arguably means that trusts with qualified no-medical-expenses provisions are "available," the Social Security Administration has issued an informal manual on SSI eligibility explaining that trusts should not be deemed "available" where "only the trustee or court, etc., can invade the principal." **Social Security Admin., Dept. of Health and Human Services, Program Operations Manual System**, SI 01120.105 A.2 (Oct.1981); see also Alabama Medicaid Agency v. Primo, 579 So.2d 1355 (Ala. Civ. App. 1991) (holding that the SSI manual's standard pertaining to trusts applies to the Medicaid context and that that standard precludes states from counting as an "available resource" testamentary trusts with qualified no-medical-expenses provisions).

significant deference under Chevron.[18/] The inconsistency of the decision below with the HCFA interpretation provides an additional reason for the grant of a writ of certiorari in this case.

B. The Policy Arguments for Not Allowing States to Count the Typical Donative Trust as an Asset Have no Application to

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[18/] See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). One important assumption that HCFA's interpretation confirms -- an assumption expressly shared by both parties in the present case -- is that the question of "available resources" under the Medicaid Act is a question of federal law. See Schweiker v. Gray Panthers, 453 U.S. 34 (1981) (assuming that the interpretation of "available" resources under § 1396a(17)(B) is governed by federal law). While the interpretation of a trust may be governed by state law, which requires inquiry into the intent of the creator, it is indisputable that the question of the extent to which the Medicaid Act honors such intent is a federal one. The few cases that discuss only state trust law are therefore presuming without argument that the federal Medicaid Act -- or state medicaid guidelines passed pursuant to the Act -- does indeed honor the creator's intent. See Lee R. Russ, Annotation, Eligibility for Welfare Benefits as Affected By Claimant's Status as Trust Beneficiary, 21 A.L.R. 4th 729 (1983 & Supp. 1991) (discussing such cases).

the Negotiated Personal Injury Settlement Trust

The Oklahoma Supreme Court offered two main arguments for not counting trusts with qualified no-medical-expenses provisions as Medicaid assets -- that is, why the Medicaid Act should honor the evasive intent behind these exclusionary clauses. First, with respect to the creator of such a trust, the court argued that a person "attempting to provide for a handicapped person should not be required to either bankrupt estates [by setting up a trust that would be used for all medical expenses until dissipated] or leave the disadvantaged party to the vagaries of public assistance programs [by deciding not to set up a trust]."[19/] Second, with respect to the beneficiary, the court suggested that it would be unfair to authorize use of the trust

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[19/] See Trust Company of Oklahoma v. State of Oklahoma, ex rel. Dep't of Human Services, 825 P.2d 1295, 1303 (Okla. 1991).

for medical expenses when such authorization would lead to its "rapid and total dissipation."[20/]

While amici question the force of these arguments as applied to the typical donative trust, neither argument has any application to personal injury settlement trusts. First, the dilemma that the Oklahoma Supreme Court wants to avoid -- forcing the trust creator either to set up a trust that will quickly dissipate or to set up no trust at all -- does not exist in the personal injury settlement trust context. The responsible tortfeasor does not have the option of not making any payments at all (whether by trust or by direct payment); state tort law requires him to provide at least some compensation to the victim. That is what it means for him to be a tortfeasor and why he comes to the settlement table in the first

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[20/] Id.

place. Indeed, to the extent compensatory damages include medical expenses, the dissipation of a settlement trust for just this purpose is what state tort law expects to happen. To avoid the trust's dissipation only by forcing Medicaid to pay medical expenses that the tortfeasor ought to have paid unnecessarily shifts the burden of liability from the responsible tortfeasor to the taxpayers.

Second, a rule that prevents tortfeasors from passing the cost of the victim's medical care on to the Medicaid system is not unfair to the victim-beneficiary. Significantly, the victim gets paid either way. Keeping the rule in mind, she should not settle unless the tortfeasor is willing to make the trust fund large enough to pay for such expenses -- or whatever equivalent calculation the injured party would make if the settlement offer involved direct

money payments. If settlement is unsuccessful and she loses the lawsuit, Medicaid will still pay her medical bills.

A rule that allows states to count personal injury lawsuits settlements is not only fair to the parties, but it affirmatively prevents the parties from cheating state and federal taxpayers. Oklahoma's rule effectively allows tortfeasors to pass on to Medicaid that portion of the tortfeasor's damages that goes to medical expenses. No private first-party health insurer would allow a responsible tortfeasor to get away with this, and nor should Medicaid. Even Medicaid itself does not allow tortfeasors to pass the buck when a settlement is paid in the form of a direct cash payment.

C. This Court Should Resolve the Split Among State Courts With Respect to Personal Injury Settlement Trusts

The two other state high court cases that have specifically addressed the

"availability" of personal injury settlement trusts under the Medicaid statute conflict with the Oklahoma Supreme Court decision. In Barham v. Rubin,[21/] the Supreme Court of Hawaii addressed a judicially-approved personal injury settlement trust that named the incompetent victim as beneficiary. As is true in all these cases, the trustee had discretion to spend the funds in the beneficiary's best interest except that he was not to spend them on medical services unless public assistance was unavailable. The Hawaii high court deemed the victim-beneficiary a creator of the trust. Accordingly, it concluded that under § 1396a(k) the trust is an MQT and thus an "available" resource for Medicaid eligibility purposes.

The court reasoned that allowing someone with this kind of trust fund to collect medical assistance "would violate the

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[21/]816 P.2d 965 (Haw. 1991).

spirit and intent of the medicaid laws."[22/] More specifically, in dismissing the argument that the victim was not a creator of the trust, the court relied on the fact that, at the time the probate court approved the settlement that contained the trust, the underlying assets "already belonged to the beneficiary."[23/] The same could be said of the underlying assets in any personal injury settlement trust. At the moment any such trust is approved by the court and thus formally "established," the beneficiary already effectively owns the legal right to compensatory damages (including medical expenses).

The other court case that directly conflicts with the Oklahoma court decision is Matter of Welfare of K.S.[24/] There, the

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[22/] Id. at 967.

[23/] Id.

[24/] 427 N.W.2d 653 (Minn. 1988).

Minnesota Supreme Court relied mainly on its interpretation of Minnesota's state medicaid eligibility guidelines rather than the federal provisions, § 1396a(17)(B) and § 1396a(k). Still, because the Medicaid Act expressly states that such state medicaid guidelines are valid only so long as they are consistent with federal law,[25/] the Minnesota court's reliance on such guidelines assumes that § 1396a(17)(B) and § 1396a(k) do not prohibit states from counting personal injury settlement trusts as assets.

Finally, there are also conflicts in the state courts over the "availability" of other kinds of trusts for Medicaid eligibility purposes."[26/] That this Court's decision

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[25/]42 U.S.C. §1396a(17)(B) (Supp. 1990).

[26/]For example, consistent with the Oklahoma Supreme Court's restrictive approach, at least three jurisdictions have adopted the rule that the Medicaid Act prohibits states from counting certain testamentary trusts as "available resources. See Alabama Medicaid

(continued...)

could provide additional guidance with respect

[26/](...continued)
Agency v. Primo, 579 So.2d 1355 (Ala. Civ. App. 1991); Tidrow v. Director, 668 S.W.2d 9 (Mo. Ct. App. 1985); Zeoli v. Comm'r of Social Service, 425 A.2d 553, 559 (Conn. 1979); see also Miller v. Ibarra, 746 F.Supp. 19 (D. Colo. 1990) (involving a judicially-imposed trust designed to protect the assets of mentally incompetent nursing home patients). Because testamentary trusts are by definition not inter vivos, they are not MQTs. Still, petitioner makes the persuasive argument that, even if § 1396a(k) does not require states to count these trusts as assets, § 1396a(17)(B), which is the general "available resource" provision, permits states to count them.

At the same time, consistent with the Hawaii Supreme Court's decision, the Arkansas Supreme Court has ruled that states may count as "available" assets settlement trusts arising out of wrongful death actions. See Arkansas Dep't of Human Services v. Donis, 655 S.W.2d 452 (Ark. 1983).

Finally, it is important to recognize that many of the court decisions involving these other kinds of trusts, especially thoses cited by the Oklahoma Supreme Court in support of its position, rest on state law and so are to that extent inapposite. See, e.g., Chenot v. Bordeleau, 561 A.2d 891 (R.I. 1989); Kline v. Utah Dep't of Health, 776 P.2d 57 (Utah Ct. App. 1989); Lang v. Commonwealth, 528 A.2d 1335 (Pa. 1987); Lineback v. Stout, 339 S.E.2d 103 (Ct. App. N.C. 1986); Hoelzer v. Blum, 462 N.Y.S.2d 684 (N.Y. App. Div. 1983); Jansen v. Department of Public Welfare, 266 N.W.2d 742 (Neb. 1978).

to these other kinds of trusts serves as one more reason the Court should take this case.

CONCLUSION

For the above reasons, amici urge the Court to accept this case in order to determine uniformly whether the Medicaid Act permits states to count personal injury lawsuit settlement trusts as "available resources."

Respectfully submitted,

GREG G. GOULD
Special Assistant
Attorney General
Department of Social
and Rehabilitation
Services
111 Sanders Street
P.O. Box 4210
Helena, Montana
59604-4210

CHARLES A. MILLER
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania
Avenue, N.W.
P.O. Box 7566
Washington, D.C.
20044
(202) 662-6000

Attorneys for Amici

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